

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

ROBBIE THOMAS,)	Civil Action No. 3: 17-cv-0048
)	
Plaintiff,)	
)	United States District Judge
v.)	Kim R. Gibson
)	
C/O LURIE, et al.,)	
)	
Defendants.)	

MEMORANDUM ORDER

This case was referred to United States Magistrate Judge Cynthia Reed Eddy for pretrial proceedings in accordance with the Magistrates Act, 28 U.S.C. §§ 636(b)(1)(A) and (B), and Local Rule of Civil Procedure 72.

On April 12, 2017, the Magistrate Judge issued a Report (ECF No. 2) recommending that Plaintiff's Motion for Leave to Proceed in forma pauperis (ECF No. 1)¹ be denied, and that this action be dismissed without prejudice to Plaintiff's paying the full amount of statutory and administrative filing fees. Service of the Report and Recommendation was made, and Plaintiff has filed Objections (ECF No. 6) and a Supplement to his Objections (ECF No. 7).

The Court finds that Plaintiff's objections do not undermine the recommendation of the Magistrate Judge. The following three cases were counted as strikes:

1) *Thomas v. Court of Common Pleas*, No. 2: 92-cv-5290 (Eastern District of Pennsylvania, Memorandum and Order of September 22, 1992, dismissing complaint as frivolous pursuant to 28 U.S.C. § 1915(d));

¹ After the Report and Recommendation was filed, Plaintiff filed a second Motion for Leave to Proceed in forma pauperis at ECF No. 3.

2) *Thomas v. McCoy*, No. 1:10-cv-1639 (Middle District of Pennsylvania, Memorandum and Order of September 22, 2011, dismissing complaint for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6)), *summarily affirmed*, No. 11-4309, 467 F. App'x 94 (3d Cir. March 9, 2012); and

3) *Thomas v. Vuksta*, No. 1:11-cv-1089 (Middle District of Pennsylvania, Memorandum and Order of May 25, 2012, dismissing amended complaint for failure to state a claim pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii)), *summarily affirmed*, No. 12-2612, 481 F. App'x 33 (3d Cir. July 27, 2012).

Plaintiff makes two arguments that he does not have three strikes. First, he argues that the magistrate judge incorrectly counted two summary appeal orders as strikes. However, the summary appeal orders were not counted as strikes; rather only the District Court's orders were counted. Therefore, Plaintiff's objection is without merit.

Next, Plaintiff argues that the Order in No. 2: 92-cv-5290 (E.D. Pa.) should not be counted as a strike because he refiled the case and later settled the case. Plaintiff's objection is without merit. While he may have filed a second case, which the Court notes was docketed at No. 2:93-cv-0031 (E.D. Pa.), this second case has no effect on his first case, No. 2: 92-cv-5290, which was dismissed as frivolous. It is also worth noting that in No. 2: 92-cv-5290, Plaintiff named only two defendants: Court of Common Pleas Philadelphia and City of Philadelphia. That case was dismissed as frivolous and closed on September 22, 1992. In January, 1993, Plaintiff filed No. 2:93-cv-0031, in which he named three defendants: Philadelphia police officers Herberto Aponte and Detective Devlin and the Honorable Frederica A. Massiah-Jackson. Case No. 2: 93-cv-0031 case has not been counted as a strike.

Furthermore, as explained in the Report, Thomas is not entitled to proceed in forma pauperis under the "imminent danger" exception to the three strikes rule. The assault which is the subject matter of the complaint occurred on June 30, 2015, at SCI-Houtzdale. At the time this lawsuit was filed, Plaintiff was housed at SCI-Benner, where he continues to be housed.

After a *de novo* review of the pleadings and documents in the case, together with the Report and Recommendation and the Objections thereto, it is hereby **ORDERED** that: Plaintiff's Motions for Leave to Proceed in forma pauperis (ECF Nos. 1 and 3) are **DENIED** pursuant to 28 U.S.C. § 1915(g); this action is **DISMISSED**, without prejudice to reopening once Plaintiff pays the full amount of statutory and administrative filing fees, totaling \$400.00; and the Magistrate Judge's Report and Recommendation is adopted as the Opinion of the District Court.

It is further **ORDERED** that Plaintiff's Motion to Appoint Counsel (ECF No. 8) is **DENIED**.

IT IS SO ORDERED this 8th day of May, 2017.

A handwritten signature in black ink, appearing to read "Kim R. Gibson", written over a horizontal line.

Kim R. Gibson
United States Magistrate Judge

cc: ROBBIE THOMAS
CY-4327
SCI Benner Township
301 Institution Drive
Bellefonte, PA 16823
(via U.S. First Class Mail)